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FILED
MAR 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1053

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

VS.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA,
Respondent,
and
CALIFORNIA DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a party has allowed an issue of federal preemption, initially litigated in state proceedings, to become final at the level of the state supreme court by failing to exercise its right to seek review by the United States Supreme Court, may the party then subsequently relitigate that issue against the same defendants in federal district court?

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The Respondent Public Utilities Commission of California (Commission) respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 716 F.2d 1285.

STATEMENT OF THE CASE

This controversy began on May 18, 1978, when the County of Los Angeles and Respondent-Intervenor, the California Department of Transportation (Caltrans), initiated proceedings before the Commission requesting that

it order the Petitioner, Southern Pacific Transportation Company (SP), to institute commuter rail service between Oxnard and Los Angeles. On June 3, 1980, following two years of proceedings before it, the Commission issued Decision 91847 requiring SP to operate the commuter rail service provided that deficits would be publicly subsidized. This decision found that SP is a common carrier of freight and passengers between Los Angeles and Oxnard, and is subject to the jurisdiction of the PUC; that public convenience and necessity required that SP operate this wholly intrastate commuter train service; and that the right of way to be used, with attendant structures and facilities, had been dedicated to common carrier purposes.

A complete chronology of the factual background of this case is set forth at pages 2-11 of the Commission's Motion to Dismiss or Affirm in the related appeal now pending before this Court in No. 83-985.[1] This chronology will not be repeated here. However, SP's contention that there is "no dispute" as to essential facts requires further discussion and/or reemphasis of certain matters.

A. Factual and Statutory Background

SP petitioned the Commission for rehearing of Decision 91847, following which further administrative proceedings were held and various decisions issued by the Commission modifying Decision 91847. But the basic requirement of that original decision, that SP provide the service, was

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[1]Reference herein to the Commission's Motion to Dismiss or Affirm in Case No. 83-985 will hereafter be referred to as "PUC Motion". SP's Petition will be referred to as "Pet.", the appendix to SP's Petition as "Pet. Appx.", the appendix to SP's Appeal in Case No. 83-985 as "Appeal Appx.", and the appendix to the instant Brief as "Appx. herein".

left intact throughout. The rehearing was concluded by April 1981; the Commission did, however, stay the time for compliance with its decision to give SP and Caltrans time to pursue further negotiations as to the amount of public subsidy required and to work out some additional unresolved operational details. Secondarily, this stay afforded SP an opportunity to pursue writ of review proceedings before the California Supreme Court.

The stay remained in effect until the Commission issued Decision 82-06-045, dated June 2, 1982. The issue of subsidization had not yet been resolved through agreement by Caltrans and SP; however, the Commission concluded the remaining unresolved operational problems were not major enough to warrant further delay. Also, judicial review had been concluded before the California Supreme Court, and SP had not sought review by the U.S. Supreme Court. Decision 82-06-045 thus required SP to begin construction of the necessary facilities on June 15 of that year.

Meanwhile, the Staggers Rail Act of 1980, PL 96-448, 94 Stat. 1895 (Staggers), had become effective October 1, 1980. Section 214 of that Act preempted uncertified states from regulating, not "intrastate rail transportation" as asserted on page 6 of SP's Petition, but rather, "intrastate rates, classifications, rules, and practices. . . ." (49 USC § 11501(b)(4)(A).)[2] States were given 120 days after the Act's effective date to obtain certification. The 120-day

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[2]The Commission argues below, at page 9, fn.5, that the issue of Staggers preemption has been litigated and is not properly before this Court. The language of the Staggers Act quoted in the above paragraph is significant to that argument, but will not be further discussed by the Commission unless certiorari is granted.

period ended on January 29, 1981, without California purposely having sought certification.

Shortly thereafter, in a petition for rehearing filed by SP before the Commission on May 7, 1981, SP asserted its argument that Section 214 of Staggers preempted the Commission from ordering SP to provide this new commuter service. SP argued that the effect of Section 214 was that "[s]tates such as California which declined to seek certification have lost all jurisdiction over intrastate transportation by operation of law." (SP Pet.Rhg., May 7, 1981, p. 25 and Ex. D.)

The Commission explicitly rejected SP's preemption claim in its denial of the petition for rehearing as set forth in Decision 93211, dated June 16, 1981. (Appeal Appx. p. 112a.)

SP subsequently filed a petition for writ of review before the California Supreme Court (S.F. 24316) challenging the orders on which the Commission had denied rehearing.[3] Recognizing that a federal preemption issue was now necessarily before the California court, the Commission in its response to SP's petition argued Section 214

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[3]California Public Utilities Code Section 1760 requires the California Supreme Court to exercise an independent judgment on the law and the facts pertaining to a constitutional challenge before the Commission and further provides that "the findings or conclusions of the Commission material to the determination of the constitutional question shall not be final." Similarly, California Public Utilities Code Section 1757, although limiting the review by the California Supreme Court to a determination of whether the Commission has "regularly pursued its authority," specifically states that this includes "a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States . . . ." These provisions are set forth in the Appendix herein, p. A-1.

of Staggers was not applicable to the type of service it had ordered SP to provide. (Pet. Appx. p. 74a-75a.) In its reply brief before the California court, SP declared, citing no authorities, that the issue was not properly before that court. But despite this declaration, SP then went on to assert its view that Staggers preempted the Commission's action in ordering the new service. SP concluded its reply brief before the California court by arguing:

> "Thus, when the California Public Utilities Commission entered its Decision No. 92863 on April 7, 1981, ordering the operation of new passenger train services, such order was a nullity, as the Commission's authority had been placed under suspension by virtue of the Staggers Act preemptions." (Pet. Appx. p. 94a.)

On December 23, 1981, the California Supreme Court denied SP's petition for review. SP did not pursue its right to seek review before the United States Supreme Court, which it had available to it under 28 U.S.C. § 1257.

B. Proceedings Before The Texas Federal District Court

At page 7 of its Petition, SP asserts that SP and the Commission were already litigating an issue as to the constitutionality of Staggers *as well as* the "scope of the Staggers Act" in a Texas district court case. (*Texas v. United States*, Civil No. A 80 CA 487 (W.D. Tex., filed December 12, 1980).) SP mischaracterizes both the nature of the Texas case and the Commission's participation therein. See PUC Motion, pp. 6-7. That case did not involve an issue of whether Section 214 applies to passenger as well as freight service, nor did that case seek to interpret the words, "rates, classifications, rules and practices" or their application to a state-ordered subsidized commuter service. The

action was brought to challenge the conceded preemptive impact that Section 214 has on state regulation of freight rates.

C. The Commission's Alleged Affirmative Relinquishment of Jurisdiction Over All Intrastate Transportation Matters To The Interstate Commerce Commission

At page 8 of its Petition, SP asserts that "the PUC asked the ICC to undertake regulation of *all* California intrastate rail transportation . . . ." (Emphasis added.) This statement is simply false. Consistent with its view that the preemptive language of Section 214 of Staggers only applied to freight rates, the Commission, following procedures devised by the Interstate Commerce Commission (ICC) to accommodate state requests that the ICC regulate where a state has been preempted, requested the ICC to assume jurisdiction *only* as to freight rates. (See the letter from the Commission dated March 4, 1982, Appx. herein, p. A-2; PUC Motion, pp. 3-5.) Also, and consistent with the Commission's contention that Section 214's preemptive language applying to intrastate freight rates was unconstitutional, the Commission made it clear that its request to assume jurisdiction was made only pending the outcome of the Texas federal court litigation. (See the letter from the Commission dated March 10, 1982, Appx. herein, p. A-4.)

This is a far cry from SP's assertion that these letters resulted in an "[a]ssumption of jurisdiction over California intrastate rail transportation" pursuant to 49 USC Section 11501(b)(4)(B).[4] This section only pertains to situations where a state has requested and been denied cer-

[4]Inaccurately cited by SP as 49 USC Section 11501(d)(4)(B).

tification. It has no application, as SP concedes at page 23 of its Petition, to states such as California, which did not apply for certification by the ICC.

REASONS FOR DENYING THE WRIT

As will be shown below, the Petition filed herein demonstrates no compelling reasons why this Court should grant certiorari. SP has made no attempt under Rule 17 of the Rules of this Court to demonstrate that conflicts exist between or among the circuits, that conflicts exist between the Ninth Circuit and this Court, that an unsettled question of federal law is involved, or that the case presents issues of such national importance that review by this Court is warranted. Indeed, the issue presented involves a matter which has long been settled by this Court. The Ninth Circuit's resolution was in complete accord with applicable precedents, and should be allowed to stand.

I

THE DECISIONS BELOW CORRECTLY APPLY THE DOCTRINE OF RES JUDICATA

The situation of this case is clearly presented. SP, a party to a Commission proceeding, urged that a recently enacted federal statute preempted the Commission from exercising continuing jurisdiction. The Commission expressly ruled against SP on this issue. SP then sought review by the California Supreme Court, in the course of which the issue was raised to that court. That court denied review, thus allowing the Commission to continue exercising jurisdiction. As the Ninth Circuit correctly recognized, SP is barred by the res judicata rule from relitigating this issue against the Commission in another forum.

A. The Issue of Whether California Has Lost Jurisdiction Over Intrastate Rail Passenger Service Has Already Been Litigated

SP's instant petition is founded upon a number of false premises. Its first is its assertion that the "core issue" in this case is Staggers Act preemption of California's authority to order intrastate passenger service (Pet., p. 9). That is *not* the issue before this Court. As succinctly stated by the Ninth Circuit, SP had the opportunity to litigate this question before the California Supreme Court. The California court, with the Staggers question before it, issued a judgment against SP. The Ninth Circuit correctly applied California and federal res judicata principles to conclude that SP was precluded from raising it again in its federal suit. When SP's false premises are stripped away, it is clear that the only issue in this case is whether the Ninth Circuit properly applied these principles.

This case presents a classic situation to which the doctrine of res judicata should apply. As recounted in the Commission's Statement of the Case in its Motion to Dismiss or Affirm in Case No. 83-985, SP has attempted to litigate the Staggers issue in every way and in every forum it could think of. Specifically, in the instant case SP sought to relitigate in federal court a federal issue which had become final in state court, because SP was unhappy with the state court decision. Both the federal district court and the Ninth Circuit recognized these efforts for what they were, and told SP it was precluded by principles of res judicata from pursuing them further. This

Court should without hesitation affirm these holdings by denying certiorari.[8]

B. The "Effect" of Staggers Was Not Already Being Litigated in Federal Court in the Texas Case

SP argues, as justification for its position that it had not raised the Staggers issue before the California court in 1981, that the issue was already being litigated in the Texas case. (Pet. p. 10.) SP adds that the Commission had stayed its original orders requiring SP to provide the service for one reason, i.e., that "the PUC elected not to attempt to exercise authority which the Texas court could, at any moment, tell the PUC it did not have." (*Id.*, p. 11.) Finally, SP argues the Texas court held that Staggers does preempt California jurisdiction over intrastate rail transportation.

On procedural grounds alone, these issues should not be considered by this Court. This Court will generally refuse to review issues not raised and considered below. *United States v. Ortiz*, 1975, 422 U.S. 891, 898. SP failed to raise any of these issues relating to the Texas litigation to the Ninth Circuit; hence the Ninth Circuit did not consider them. SP presents no reasons why the Court should not follow its usual rule; thus, these issues should not be considered.

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[8]The Commission does not consider the Staggers issue to be properly before this Court. However, should the Court disagree and decide to reach around the Ninth Circuit res judicata decision, the Commission reserves the right to respond on the merits. The Commission has already briefly discussed provisions in Staggers which demonstrate that its purposes were limited to freight matters (see PUC Motion, pp. 3-5, fn. 2). Should the Court grant certiorari in this case, the Commission will expand upon and add to this discussion.

Moreover, these issues are completely without merit. The Commission's decisions were initially stayed because SP had filed a petition for rehearing before the Commission in time to invoke an automatic stay provision of state law. Subsequently, the stay was extended for the reasons discussed previously. In no way were those stays related to the Texas litigation. SP's allegation is pure fabrication, totally unsupported by the records in this case, the Texas case, or any Commission proceeding.

Concerning the substance of the Texas case, this case involved a constitutional challenge to Section 214 of Staggers. The Tenth Amendment to the United States Constitution was the principal basis for the challenge, and the central focus of the case was *National League of Cities v. Usery*, 1976, 426 U.S. 833. In contrast, the instant case involved a constitutional challenge not to Staggers, but *to an implementation of state laws* authorizing a state agency (the Respondent Commission) to order intrastate commuter service where required in the interest of public convenience and necessity. Supremacy Clause issues were involved (Art. VI, Clause 2), and the focus was on federal preemption and the intent of Congress. No such issues were present in the Texas case, nor were freight versus passenger issues. In short, the Texas case involved an entirely different cause of action. The challenge was to the authority of the Congress of the United States, not to the authority of the Public Utilities Commission of California.

It would have been most inappropriate for the Commission to have injected the preemption issue into the Texas case, and there would have been no reason for it to do so. The Commission was satisfied that Staggers did not apply

to passenger service orders, and its only purpose in intervening in the Texas case was to challenge Staggers' preemption of freight rates.

SP places heavy reliance on the Commission's failure to appeal the Texas ruling. But the Commission's decision not to appeal has no relevance to the instant case, because the Texas ruling did not address the intrastate passenger service preemption issue. Moreover, by the time of the Texas ruling, that issue had already been finally concluded by the California Supreme Court and put to rest, as between the parties, by SP's failure to seek review by this Court. No purpose would have been served in attempting to reargue an issue that had previously been litigated and finally concluded.

C. Review By This Court of the Federal Preemption Issue in December 1981 Would Not Have Been Premature

As noted earlier, when the California Supreme Court undertook a review of the Commission proceedings brought before it, that court had before it SP's preemption challenge and the determination thereof by the PUC in Decision No. 93211. The California court declined to grant SP's requested relief. Thus the highest court in California approved the PUC's continuing exercise of jurisdiction over the intrastate service.

In arguing that the matter was not ripe for review by this Court, SP's reliance on *Cox Broadcasting Corp. v. Cohn*, 1975, 420 U.S. 469, is misplaced. *Cox* involved the issues of finality of the state judgment, and when review by this Court could occur in the absence of such finality. Here, there is no doubt whatsoever that the California

judgment in 1981 was final on the federal issue and appealable to this Court. This judgment was not subject to further review in the state courts. Moreover, no further proceedings in the state court were anticipated, except inasmuch as such could be predicted to be inevitable from SP's past litigious behavior. Finally, even assuming *arguendo* that further state issues could be anticipated to be before the California Supreme Court, appeal of the Staggers issue before this Court was ripe under *Cox*. As in that case, even if SP were to prevail in those further proceedings on nonfederal grounds, if the California Court had erroneously upheld the Commission's order, those further proceedings should never occur at all. *Cox, supra,* 420 U.S. at 485.[6]

Dump Truck Owners Assn. v. Public Util. Comm., 1977, 434 U.S. 9, is also inapplicable to this case. In *Dump Truck*, the Commission had granted rehearing while the appeal to this Court was pending, and was reconsidering the rate order appellants had challenged as unconstitutional. This reconsideration might well have made the federal claim moot; thus it was reasonable for this Court to have dismissed the action as being premature. In the case at bar, the rehearing granted by the Commission had been concluded prior to SP's filing S.F. 24316 in the California Court. While time for compliance with the decision had been stayed, the Commission was not in the process of reconsidering any issues related to SP's claims, federal or

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[6]Moreover, the rule is settled that when the question is whether it is unconstitutional to fasten a state administrative procedure onto a litigant, this purely legal issue is ripe for decision. (See generally Wright, Miller and Cooper, *Federal Practice and Procedure:* Jurisdiction, § 3532, p. 244. See also *Abbott Laboratories v. Gardner*, 1967, 387 U.S. 136, 149.

state, as it had been in *Dump Truck Owners*. A stay of a decision pending negotiations is not equivalent to holding a rehearing of that decision based on a challenge to its legal basis.

Finally, SP's assertion that the issue was raised in the Texas court is irrelevant to the ripeness issue because, as already noted, the issue of whether Staggers preempts states from ordering publicly subsidized commuter passenger train service was never before the Texas court. It is, moreover, completely inconsistent for SP to claim that although no cognizable federal issue existed in the California proceedings which could have been taken to this Court, such an issue did exist in the Texas proceedings, which did not remotely involve review of a state order that a railroad provide intrastate passenger commuter service.

II

SP MISSTATES THE CALIFORNIA RULE ON RES JUDICATA AS IT APPLIES TO DECISIONS OF THIS COMMISSION

A. The California Supreme Court's Denial Of Review Constituted a Judgment on the Merits

SP's initial assertion that the California court's 1981 denials could have been on procedural grounds, thus making res judicata inapplicable, should not be considered by this Court. SP did not raise this issue to the district court at all. It did not raise the issue to the Ninth Circuit until it filed its reply brief. That court refused to consider the issue on the basis of its being untimely raised (Pet. Appx., p. 8a; see also *Hamilton v. Firestone Tire & Rubber Co.*, 9 Cir., 1982, 679 F. 2d 143, 146), and this Court should do likewise. SP's further argument that under California law,

res judicata cannot apply if the basis for a decision is uncertain, was never presented to the Ninth Circuit. Obviously it was not considered by that court and should not be by this Court. *United States v. Ortiz*, 1975, 422 U.S. 891, 898.

SP, moreover, misreads *Consumers Lobby Against Monopolies v. Public Util. Comm.*, 1979, 25 Cal. 3d 891, and the other authorities it cites as standing for the proposition that, under California law, a denial of review without opinion forbids application of the doctrine of res judicata. To the contrary, *Consumers Lobby* makes clear that when the California Supreme Court denies without opinion a petition for review of a Commission decision, it is a judgment on the merits for res judicata purposes.

Consumers Lobby involved the question of whether *stare decisis effect* should be given to a prior denial of a writ of review issued without opinion. There was no issue involving res judicata. In fact, the court explicitly let stand the rule set forth in *People v. Western Air Lines*, 1954, 42 Cal. 2d 621, 630-631, that "[b]ecause it must therefore be deemed a decision on the merits, our denial of such a petition [for writ of review of a Commission decision] raises the bar of res judicata against relitigation of the same cause of action between the same parties. . . ." *Consumers Lobby*, 25 Cal. 3d at 901. The language of *Consumers Lobby* quoted by SP on page 15 of its Petition is taken totally out of context and refers to the stare decisis rule, not the res judicata rule.

The rule affirmed in *Consumers Lobby* reflects the current state of California law on res judicata as it applies to the California Supreme Court's denial of petitions for review of Commission decisions. The Ninth Circuit cor-

rectly applied this law. *Pacific Telephone & Telegraph Co. v. Public Util. Comm.*, 9 Cir., 1979, 600 F.2d 1309, 1311-1312; *cert. denied* 444 U.S. 920. None of the cases cited by SP to be contrary to this rule (see Pet. p. 16) is applicable to denials of petitions seeking review of Commission decisions.[7]

III

IT IS CLEAR THAT, WHERE RES JUDICATA APPLIES, A FEDERAL COURT MUST RESPECT A STATE COURT'S INTERPRETATION OF FEDERAL LAW

The crucial question is whether the res judicata principle expressed in *Consumers Lobby* was correctly applied in this case. It is well settled that as a general proposition, federal courts must accord state court judgments on federal constitutional issues res judicata effect. *Grubb v. Public Utilities Commission of Ohio*, 1930, 281 U.S. 470. SP contends this rule is inapplicable here, because this

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[7]Indeed, in its Statement of Issues before the Ninth Circuit, SP all but conceded that *under California law* the denial of the petition for writ of review herein would be entitled to res judicata effect. SP's premise was that such a state judgment should not be given res judicata effect in federal court where Supremacy Clause issues are involved. SP commenced its Statement of Issues by asking:

> "Can the rule of California law, that the denial by the Supreme Court of California—without hearing or opinion—of a petition for writ of review directed to the California PUC, is a decision on the merits and entitled to *res judicata* effect, be applied consistently with the Supremacy Clause . . . ?" (Brief for Appellant, p. 1.)

In the very first footnote of its opening brief before the Ninth Circuit, SP asserted that the "rule of California law" was "[l]aid down in People v. Western Air Lines, 42 Cal.2d 621, *app.dism.*, 348 U.S. 859 (1954), and recognized by this Court in *Pacific Tel. & Tel. Co. v. PUC*, 600 F.2d 1309 (9th Cir.) *cert. denied* 444 U.S. 920 (1979)." (Brief for Appellant, p. 1, fn. 1.)

case fits into what SP asserts as "important exceptions" to that rule, namely a claimed exception where Congress has preempted state action in a given area.

Here, as before the Ninth Circuit, SP's argument suffers from two infirmities. First, SP presumes its view of Staggers is the correct one. This presumption goes directly counter to the California Supreme Court decision to which the Ninth Circuit accorded res judicata effect. If res judicata was correctly accorded, SP's premise on Staggers would be *a fortiori* defeated. (Pet. Appx., p. 6a.)

Secondly, SP persists in confusing the authority of a state regulatory authority with that of a state court. The primary authorities cited by SP to support its "important exceptions" argument are cases where Congress has restricted subject matter jurisdiction to the federal courts. The Ninth Circuit opinion states that SP has pointed to nothing in Staggers so limiting subject matter jurisdiction over cases arising under that Act, thus *Kalb v. Feuerstein*, 1940, 308 U.S. 433, and *Consolidated Rail Corporation v. Illinois*, Regional Rail Reorg. Ct., 1976, 423 F.Supp. 941, do not control. For other reasons well stated by the Ninth Circuit, SP's other cases are equally inapposite. (See Pet. Appx., pp. 7a-8a.) Having been shown no reason to depart from it, the Ninth Circuit correctly and appropriately applied the general rule as set forth in *Grubb*[8] that when a state court has jurisdiction of the subject matter, a judg-

[8]*Grubb* involved a situation similar to the instant one where a petitioner sued in federal court to enjoin a state utilities commission order. The federal court dismissed the suit on the ground that a state supreme court decision issued while the federal suit was pending was res judicata. The issue in both suits was whether the state commission's order violated the Commerce Clause.

ment of that court which has become final must be given res judicata effect by federal courts as to all matters which were or could have been raised. (Pet. Appx., p. 6a; see also *Grubb*, 281 U.S. at 478-479; *Angel v. Bullington*, 1947, 330 U.S. 183, 189-191.

IV

SP DID RAISE ITS STAGGERS ACT CLAIM BEFORE THE STATE SUPREME COURT AND SP'S CLAIM IN THE DISTRICT COURT DID NOT INVOLVE A NEW CAUSE OF ACTION

As found by both the federal district court and the Ninth Circuit, SP's challenge to the Commission's continuing jurisdiction in view of Staggers (1) was ripe for determination in the California Supreme Court, and (2) was before that court in S.F. 24316, SP's 1981 request for review of the Commission's early decisions, where it was concluded against SP.

Consistent in its denial of this, SP first cites *England v. Board of Med. Exam.*, 1964, 375 U.S. 411, as support for its argument that it had the right to "reserve" its Staggers preemption issue to the Texas federal district court. As noted in Section I.B. above, none of SP's Texas case arguments was raised in the district court or Ninth Circuit, and should not be considered here. SP's argument also, of course, presumes the Staggers issue was present in the Texas case, an argument the Commission has refuted at length.

Concerning its alleged right to "reserve" the Staggers issue in this way, SP has cited no rule of law which allows a party to decide, where a state and federal court have concurrent jurisdiction of a federal issue, that the state court

cannot hear the issue where that issue has been raised by one of the parties and responded to by the other. In fact, the law is just the opposite. *Grubb, supra,* 281 U.S. at 476.

The exception, where the abstention doctrine is applied by a three-judge federal court so that a state court may first consider the state issues, and where a party has specifically reserved the right to return to federal court if necessary on the federal issues, is not present here. Hence, *England v. Board of Med. Exam.* is inapplicable.

SP then asserts that even if its preemption issue was concluded against it in 1981 by the California court, it could raise that issue again to the federal district court because a new cause of action arose on May 11, 1982. SP's instant petition states that the district court suit was based not on "anything that had transpired prior to the California supreme court's December 1981 decision, but rather because of the May 11, 1982 order of the ICC assuming exclusive jurisdiction." (Pet., p. 24.) Not only is SP's premise as to the crucial nature of the May 11 order erroneous, its claim is not the one put forth in the district court or the Ninth Circuit. In its opening brief to the Ninth Circuit, heading 3 on page 20 reads:

> "The Staggers Act Deprived California of Jurisdiction over Intrastate Rail Transportation *as of January 29, 1981,* and ICC Assumed Exclusive Jurisdiction as of May 11, 1982. *All Orders of CPUC on This Subject Since Those Dates Are Without Jurisdiction and Void.*" (Emphasis added.)

Clearly, SP believed its cause of action reached back to January of 1981. The Ninth Circuit, while not reaching back that far, concluded that SP's cause of action arose at

least as long ago as April 17, 1981, the date of the ICC's pronouncement that California had lost jurisdiction under Staggers. (Ex Parte No. 388, 364 I.C.C. 881, 46 Fed. Reg. 23335; Appeal Appx., p. 185a.) This gave SP ample time to raise the issue to the California Supreme Court, and meant to the Ninth Circuit that SP had no new cause of action to bring before the district court. (Pet. Appx., pp. 9a-10a.)

The Ninth Circuit was correct; the ICC's May 11 order was plainly and simply an order implementing its April 1981 pronouncement. It did nothing to change either SP's original claim that the Commission was preempted under Staggers or the California court's judgment thereon, nor did it provide any new basis for raising that claim again in another forum.

As importantly, the May 11 order, somewhat broad though its language is, applied at best only to the jurisdiction the Commission asked the ICC to assume: that over intrastate freight rates.[9] The two letters set forth in the Appendix to this Brief make this clear. (Appx. herein pp. A-2—A-4.) Those letters state that the Commission's request is limited to freight rates, consistent with its position taken in the Texas litigation, and dependent, moreover, on the outcome of that litigation. The Texas judgment upheld the preemptive effect of Staggers over intrastate freight rates, and the ICC's assumption of jurisdiction must necessarily be limited to that area.

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[9]This order is just one part of the ICC's Ex Parte No. 388 proceeding, begun in late 1980, entitled "State Intrastate Rail *Rate* Authority—P.L. 96-448." (Emphasis added.) See Appeal Appx., p. 180a.

Finally, because its view of Staggers forms the major premise of its May 11, 1982 argument, this argument is dependent on SP's assertion that the Staggers preemption issue was not actually litigated before the California Supreme Court. As demonstrated above, this assertion is without merit; that issue was not only litigated but concluded against SP in that forum. Thus SP clearly is barred by concepts of issue preclusion even if a new cause of action were involved. (*United States v. Mendoza*, 1984, ... U.S. ....., 78 L.Ed.2d 379, 383-384; *Montana v. United States*, 1979, 440 U.S. 147, 153.)[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated, San Francisco, California

March 14, 1984.

Respectfully submitted,

JANICE E. KERR
HECTOR ANNINOS
ANNE K. MESTER
Attorneys for the Public Utilities Commission of the State of California

[10]The cases SP cites on pages 24 and 25 of its Petition only apply where a new, unrelated cause of action is the basis for the new suit, and where the issue raised was not previously determined conclusively against the parties involved. Because neither of these situations applies to the instant facts, these cases are inapposite.

(Appendix follows)

Appendix

California Public Utilities Code:

Section 1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

Section 1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

PUBLIC UTILITIES COMMISSION
State of California

File No.

March 4, 1982

Chairman Reese H. Taylor, Jr.
Interstate Commerce Commission, Room 3219
Twelfth St. & Constitution Ave. N. W.
Washington, D.C. 20423

Dear Chairman Taylor:

RE: Ex Parte No. 388, State Intrastate
Rail Rate Authority

As you may know, we are contesting the constitutionality of Section 214 of the Staggers Act in *State of Texas and Railroad Commission of Texas, et al.* v. *United States of America and Interstate Commerce,* Civil No. A-80-CA-487 (D.C. Tex.). Because that case is still pending, California has chosen not to comply with Section 214 and become certified. This lack of certification should not be interpreted as supporting the deregulation of intrastate freight rates. On the contrary, we want intrastate freight rates to continue to be regulated.

The issue to be resolved in the Texas suit is whether federal law or state law should control the regulation of intrastate freight rates. During the time this issue is pending before the Court, we anticipate that the ICC will not allow there to be any break in the regulation of intrastate freight carriers.

We believe that this letter complies with the request of the ICC in its decision served February 8, 1982 in Ex Parte No. 388.

Very truly yours,

JOSEPH E. BODOVITZ

Joseph E. Bodovitz
Executive Director

PUBLIC UTILITIES COMMISSION
State of California

File No.

March 10, 1982

Chairman Reese H. Taylor, Jr.
Interstate Commerce Commission, Room 3219
Twelfth Street & Constitution Ave., N. W.
Washington, D.C. 20423

Dear Chairman Taylor:

Re: Ex Parte No. 388. State Interstate
Rail Rate Authority

The California Public Utilities Commission (CPUC) in compliance with Ex Parte No. 388 recently notified the Interstate Commerce Commission (ICC) in a letter dated March 4, 1982 that the CPUC anticipated "that the ICC will not allow there to be any break in the regulation of intrastate freight carriers." The CPUC meant this statement to be a request that the ICC assume jurisdiction under the Staggers Act over the intrastate freight rates only pending the outcome of *State of Texas & Railroad Commission of Texas, et al. v. United States of America & Interstate Commerce*, Civil No. A-80-CA-487 (D.C. Tex.). If the ICC does not regard the CPUC March 4, 1982 letter as such a request, please regard this letter as such.

Sincerely,

JANICE B. KERR

Janice B. Kerr
General Counsel